Supreme Court, U.S.
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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United State Court of Appeals
for the Seventh Circuit

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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REPLY AS TO QUESTION PRESENTED

Without explanation, Schacht represents the question presented to be far narrower than the one articulated by defendants . *Compare* Opposing brief, p. i *with* Petition, p. i. He downplays the question presented by ignoring defendants' two main arguments and responding as if the petition were instead limited to arguing that there is a "futility exception" to 28 U.S.C. § 1447. The petition correctly stated the question presented.

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After declining to respond on his own, the Court required Schacht, under S.Ct.R. 15.1, to respond to the petition. (12/3/97 letter from Clerk Suter to Attorney Lasker.) Schacht chose an intriguing strategy. Rather

than address defendants' two main arguments (*see* Petition, pp. 6 and 14), his response assumes defendants restricted themselves to arguing only for a "futility exception" under 28 U.S.C. § 1447 (*see* Petition, pp. 20-21).

He responds as if defendants conceded both that the district court lacked any subject matter jurisdiction over this removed action and that, unless a "futility exception" exists under 28 U.S.C. § 1447, the appellate court decision was correct. The petition instead argued that the district court had subject matter jurisdiction over this removed action. Petition, pp. 6-14. It also argued that, regardless, the appellate court erred since a definitional bar to those of Schacht's claims subject to jurisdictional concerns rendered the court's *sua sponte* inquiry unnecessary and its mandate a serious blow to our federalist system. Petition, pp. 14-24. Under this Court's rules, both arguments are properly before the Court since they were pressed, and passed on, below and were fairly included in the petition. Lebron v. Nat'l R. Passenger Corp., 513 U.S. 374, 379 (1995); S.Ct.R. 14.1.

In analyzing the Question Presented and these two main arguments, and in response to the appellate court reasoning, defendants did raise and discuss the subissue of whether a "futility exception" exists under 28 U.S.C. § 1447. (Petition, pp. 20-21; App. 5.) Schacht's opposing brief addresses only this subissue.

This Court, by requiring Schacht, under S.Ct.R. 15.1, to file an opposing brief, directed him to comply with S.Ct.R. 15.2 which states, in relevant part:

> **2.** . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

S.Ct.R. 15.2. Beyond responding to defendants' analysis of the "futility exception" subissue on pages 20 and 21 of the petition, Schacht made no attempt to "point out" or "address" any "perceived misstatement of fact or law" in the petition. S.Ct.R. 15.2.

By ignoring defendants' main arguments, he risked being precluded, if the petition is granted, from challenging those arguments in briefing on the merits. *E.g.*, Howlett v. Rose, 496 U.S. 356, 381, n.24 (1990) (declining, on the merits, to reach a "contention [which] was not presented in respondent's brief in opposition to the petition for certiorari"). Considering the ratio of petitions filed to petitions granted, the benefits of downplaying the importance of a case at the petition level may appear to outweigh that risk. The Court is entitled, nonetheless, to assume that, if Schacht had any viable points to make in opposition to defendants' main arguments, he would have made those points.

Because Schacht mustered **no** opposition to defendants' arguments other than on the "futility exception" subissue, the Court could, if the petition is granted, limit him to the opposing arguments he has already made. *E.g.*, Howlett, 496 U.S. at 381, n.24. Defendants submit that the issues articulated in the petition are too important to be resolved on the merits in that fashion (*e.g.*, Ohio v. Robinette, 519 U.S. ___, 117 S.Ct. 467, 476, 136 L.Ed.2d 347 (1996) (though respondent did not address an issue in brief opposing certiorari, it was briefed on the merits and was "'predicate to an intelligent resolution'" of the question presented such that Court proceeded to decide it), and would instead Schacht, in his

brief on the merits, to try to defend the appellate court decision by whatever arguments he can develop.

This Court, not respondents, decide which, among issues properly presented at the petition level, are to be resolved. *E.g.*, Lebron, 513 U.S. at 379; United States v. Williams, 504 U.S. 36, 40-45 (1992); United States v. Wells, 519 U.S. ___, 117 S.Ct. 921, 925, 137 L.Ed.2d 107 (1997). "'The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions . . . would thwart this system.'" Lebron, 513 U.S. at 379 *quoting* Taylor v. Freeland & Kronz, 503 U.S. 638, 646 (1992). A respondent may not shield faulty appellate court reasoning from an inquiry properly made in a petition by ignoring the inquiry.

Ironically, Schacht demonstrates that, if defendants had themselves restricted the petition to presenting only the "futility exception" subissue, that single question would merit resolution by the Court. The petition, supplemented by Schacht's opposing brief, reveals that the circuits are divided on this subissue and may well be misinterpreting this Court's decision in Primate Protection League v. Tulane, 500 U.S. 72 (1991). Opposing brief, pp. 7-13.

Schacht minimizes this division by asserting that the last word from the Court of Appeals for the Fifth Circuit preceded Primate Protection League in Ascarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990). Opposing brief, pp. 10-11, text and n. 3. The petition noted, however, that in Primate Protection League itself, after remand from this Court, the Fifth Circuit concluded there **was** a "futility exception" in removal cases. In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266 (5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh'g and reh'g en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). *See* Petition, pp. 20-21 and quotation from In re Adm'rs of

the Tulane Educational Fund, 954 F.2d at 270. Though the Court having declined to review that subsequent Fifth Circuit decision merely means that, with the Court exercising its sound discretion, fewer than four Justices voted in favor of review (*e.g.*, Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-18 (1950), it diminishes the potential that Primate Protection League precluded any futility exception in removal cases.

Defendants submit that the Third Circuit correctly viewed these comments in Primate Protection League as *dicta* which merely raised, rather than answered, questions. *E.g.*, Bromwell v. Michigan Mutual Insurance Co., 115 F.3d 208, 214 (3rd Cir. 1997) (Primate Protection League "in *dicta*, expressed a reluctance to recognize" a futility exception in removal cases). By contrast, the Fourth and Seventh Circuits misread those comments as a blanket holding that there can never be a "futility exception" to 28 U.S.C. § 1447. *E.g.*, Roach v. West Virginia Regional Jail and Correctional Facility Authority, 74 F.3d 46, 49 (4th Cir. 1996); Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1424 (1997). A district court in the Fourth Circuit recently expressed dismay at having to hew to Roach in remanding to State court, as here, claims which would unquestionably be dismissed in any court. Lowery v. Prince George's County, Md., 960 F.Supp. 952, 957-59 (D.Md. 1997).

Schacht's assertion that other circuits have held there is no futility exception in removal cases is not supported by his citations. He cites Barbara v. New York Stock Exchange, 99 F.3d 49, 56, n. 4 (2nd Cir. 1996) as if it held there "probably" was no futility exception in removal cases in light of Primate Protection League even though Barbara expressly noted it was **not** necessary to reach, and was not reaching, that question. 99 F.3d at 56, n. 4. He also improperly cites an "unpublished" opinion by

the Tenth Circuit as precedent. Opposing brief, p. 10. *See* Tenth Circuit R. 36.3.

Though the confusion over the "futility exception" subissue would itself justify granting the petition, defendants identified it as a secondary matter because resolution of this case, if the petition is granted, will instead likely turn on the main arguments identified in the petition such that this subissue may need be reached. That Schacht mustered no opposition to defendants' main arguments is a remarkably revealing commentary on how flawed the appellate court reasoning is and how important it is to assure the appellate court decision does not continue to disrupt proper relations between fellow sovereigns by allowing plaintiffs to turn the shield of Eleventh Amendment immunity into a sword.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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